Dr YG Tan Jurutera Perunding Sdn Bhd v Projek Lebuhraya Usahasama Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(C)-1028–05 OF 2017
DAVID WONG, ABANG ISKANDER AND HASNAH HASHIM JJCA
5 APRIL 2018

Civil Procedure — Joinder of parties — Rules of Court 2012, O 15 r 6(2) — Plaintiff withdrew its claim against one of three defendants it had sued for negligence — Court struck out plaintiff's claim against said defendant with no liberty to file afresh — Another defendant in suit applied to add struck out party back as a co-defendant to the same action against plaintiff's wishes — Applicant had pleaded that struck out party was to blame for the negligence alleged by the plaintiff — Whether High Court was wrong to allow the joinder application as it went against the terms of the earlier striking out order — Whether res judicata barred plaintiff from re-suing the struck out party as a co-defendant in the same action — Whether proper course was for the applicant/defendant to take out a third party notice against the struck-out party

Perbadanan Kemajuan Negeri Selangor ('PKNS') sued the appellant, the respondent and another party in the High Court for negligence for causing a section of a cloverleaf inter change on the North–South Expressway Central Link to collapse. PKNS settled its claim against the appellant and notified the court that it was withdrawing its suit against the latter. The court accordingly struck out PKNS' claim against the appellant with no liberty to file afresh. The respondent subsequently applied to add the appellant as a co-defendant. The High Court allowed the application ruling that pursuant to O 15 r 6(2) of the Rules of Court 2012, the court had a general discretion to add a co-defendant although it was against the wishes of the plaintiff especially where the application to add was limited to matters arising in the pleadings, ie, where the statement of claim disclosed a case against the proposed co-defendant. The court ruled that the issue before it was the collapse of the cloverleaf interchange and who had caused it and, in that context, the respondent's pleadings blamed the appellant for the mishap. In the instant appeal against the decision, the respondent submitted that the High Court did not err in making the appellant a co-defendant as that enabled all matters in dispute in the suit to be effectively and completely determined and adjudicated upon, allowed the trial court to apportion liability between the parties, if necessary, and also ensured that no prejudice was occasioned to any party.

Held, allowing the appeal, setting aside the order of the High Court and directing the respondent to file a third party notice against the appellant:

(1) In the instant case, PKNS withdrew its claim against the appellant with, inter alia, no liberty to file afresh premised on a settlement reached between them. What that meant was that whatever pleadings made in the struck out statement of claim vanished from the pages of the statement of claim, so to speak, and hence could not be part of any pleadings. To require PKNS in such circumstances to maintain its claim against the appellant went against the very terms of the striking out order made by the court of PKNS' claims. There was merit in the appellant's contention that as between the appellant and PKNS, any action by PKNS against the appellant was barred by res judicata (see para 14).

(2) The respondent would not be prejudiced if a third party notice was taken out — a course of action the appellant had not objected to both in the High Court as well as before this court (see para 15).

[Bahasa Malaysia summary

Perbadanan Kemajuan Negeri Selangor ('PKNS') menyaman perayu, reponden dan pihak lagi satu di Mahkamah Tinggi untuk kecuaian kerana menyebabkan bahagian persimpangan kelawar di Lingkaran Tengah Lebuhraya Ekspres Utara–Selatan runtuh. PKNS menyelesaikan tuntutannya terhadap perayu dan memberitahu mahkamah bahawa ia menarik balik tindakannya terhadap perayu. Mahkamah oleh itu membatalkan tuntutan PKNS terhadap perayu tanpa kebebasan untuk memfailkan tuntutan baru. Responden kemudiannya memohon untuk memasukkan perayu sebagai defendan bersama. Mahkamah Tinggi membenarkan permohonan memutuskan bahawa berikutan A 15 k 6(2) Kaedah-Kaedah Mahkamah 2012, mahkamah mempunyai budi bicara am untuk memasukkan defendan bersama walaupun ia adalah bertentangan kehendak plaintif terutamanya di mana permohonan untuk memasukkan adalah terhad kepada perkara yang berbangkit dalam pliding, iaitu di mana penyataan tuntutan mengemukakan kes terhadap defendan bersama yang dicadangkan. Mahkamah memutuskan bahawa isu di hadapannya adalah keruntuhan persimpangan kelawar tersebut dan siapa yang menyebabkannya dan, dalam konteks tersebut, pliding responden menyalahkan perayu untuk kejadian yang tidak diingini tersebut. Dalam rayuan ini terhadap keputusan tersebut, responden berhujah bahawa Mahkamah Tinggi tidak tersilap dalam membuat perayu sebagai defendan bersama kerana ini membolehkan kesemua perkara dalam pertikaian dalam tindakan untuk menjadi efektif dan benar-benar ditentukan dan dihakimi, membenarkan mahkamah perbicaraan untuk membahagikan liabiliti di antara pihak-pihak, jika perlu, dan juga memastikan bahawa tiada prejudis dilakukan kepada mana-mana pihak.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan mengarahkan responden untuk memfailkan notis pihak ketiga terhadap perayu:

(1) Dalam kes ini, PKNS menarik balik tuntutannya terhadap perayu dengan, antara lain, tiada kebebasan untuk memfailkan tuntutan baru berdasarkan penyelesaian yang dicapai di antara mereka. Apa yang dimasukkan adalah bahawa apa-apa pliding yang dibuat dalam penyataan tuntutan yang dibatalkan lenyap daripada kesemua muka surat penyataan tuntutan, boleh dikatakan, dan maka tidak boleh menjadi sebahagian mana-mana pliding. Untuk mengkehendaki PKNS dalam keadaan sedemikian untuk mengekalkan tuntutannya terhadap perayu bertentangan terma-terma perintah pembatalan yang dibuat oleh mahkamah terhadap tuntutan PKNS. Terdapat merit di dalam hujahan perayu bahawa seperti perayu dan PKNS, apa-apa tindakan oleh PKNS terhadap perayu adalah dihalang oleh res judicata (lihat perenggan 14).

(2) Responden tidak akan diprejudis jika notis pihak ketiga diambil — tindakan undang-undang di mana perayu tidak membantah di Mahkamah Tinggi dan juga di hadapan mahkamah ini (lihat perenggan 15).]

Notes

For cases on joinder of parties in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5096–5099.

Cases referred to

Abidin bin Umar v Doraisamy & Anor [1994] 1 MLJ 617, HC (refd)
Alcim Sdn bhd v Torlf Mueller & Ors [2013] 1 LNS 469, HC (refd)
Kerajaan Negeri Kelantan v Kerajaan Malaysia [2011] 6 CLJ 638, CA (refd)
Tajjul Ariffin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143; [1993] 3 CLJ 117, SC (folld)

Legislation referred to

Rules of Court 2012 O 15 r 6(2)

Appeal from: Suit No 22C–20–09 of 2014 (High Court, Shah Alam)

Sia Siew Mun (Alvin Oh Seong Yew with him) (Sia Siew Mun & Co) for the appellant.
Wong Hok Mun (Koh Pei Siah and Jasreen Kaur with him) (Azim, Tunku Farik & Wong) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal relates to the decision of the High Court where the learned judge allowed the respondent's application to add the appellant as a co-defendant in a suit between the plaintiff ('PKNS') and the appellant pursuant to O 15 r 6(2) of the Rules of Court 2012.

[2] We heard the appeal and reserved our decision. We have since further considered submissions from respective counsel and now give our decision and grounds.

BACKGROUND FACTS

[3] PKNS had filed a suit against the appellant, respondent and B & I Builder Sdn Bhd in respect of a collapse of a section of a cloverleaf interchange over the North–South Expressway Central Link on 28 February 2013.

[4] PKNS's cause of action against the appellant, as the main infrastructure consultant and/or consultant engineer, was for negligence in the design and/or supervision of the construction of the cloverleaf interchange. As for the cause of action against the respondent it is also for negligence in carrying out some rectification works which led to the collapse of the cloverleaf interchange. They were sued jointly and severally for their negligence.

[5] On 9 January 2017, PKNS informed the court that they have settled their claim against the appellant and accordingly the suit against the appellant was withdrawn with the court striking out PKNS's claim against the appellant with no liberty and no costs.

[6] On 17 February 2017, the respondent through encl 162 applied that the appellant be added as a co-defendant.

HIGH COURT

[7] On 21 April 2017 after hearing submissions from respective counsel, the learned judge ordered the appellant be added as a co-defendant.

[8] The learned judge's rationale for her decision can be found in paras 16–19 of her ground where she said as follows:

> [16] Referring to the principles of a joinder application as laid down in O 15 r 6(2) and *Tajull*, the prime consideration has to be that all necessary and proper parties should be before the court at the same time to enable the effectual and complete

detention and adjudication of all questions and issues between the parties. The issue before the court is the collapse of the interchange and who caused it. It is thus necessary that YG Tan be added as a co-defendant as the pleadings of PLUS were that YG Tan's role and/or action had a direct bearing and/or was the direct cause of the collapse of the interchange. Refer to para 4 of affidavit in support in encl 163 which has been set out in para 7 above.

[17] As to the principle that a defendant cannot be added against PKNS's wish, this must be considered in the light of *Saminathan Ramasamy v Rukuman Marjuki & Anor* [1998] 5 CLJ 718 where it was stated at pp 726–727.

> It is therefore clear that when the application is made by the defendant to add a co-defendant against the wishes of the plaintiff the application must be limited to matters arising in the pleadings, that is to say, the statement of claim must disclose a case against the proposed co-defendant. It was for this reason that the Supreme Court ruled in *Tajjul Ariffin* that a plaintiff cannot be compelled to amend his pleadings to accommodate an intended co-defendant.

...

Notwithstanding what I have said the court has a general discretion to add a co-defendant against the wishes of the plaintiff ...

[18] This therefore means YG Tan can be added as a co-defendant against PKNS's (respondent herein) wish as long as the application to add is limited to the pleadings, which has been shown to be the case.

[19] On prejudice to parties, it would be PLUS (respondent herein) that would be more prejudiced if its application was not allowed as its case was always premised on YG Tan being a co-defendant as compared to YG Tan who was already a party to the counterclaim of PLUS (respondent herein).

OUR GROUNDS OF DECISION

[9] There is little doubt in our mind that this appeal requires us to determine whether the learned judge was right in making the appellant a co-defendant pursuant to O 15 r 6(2) of the Rules of Court 2012 which provides as follows:

> 6(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application—
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely—
>
> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter

there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and the party as well as between the parties to the cause or matter.

[10] Logic dictates that a plaintiff has the absolute discretion to decide whom to sue and the type of remedies. The rationale behind this logic is aptly set out in *Janab's Key to Civil Procedure in Malaysia and Singapore* by Hamid Sultan bin Abu Backer at p 128 which reads as follows:

5.17 Adding Co-defendant by defendant

It was almost trite law that it is the absolute right of the plaintiff to decide whom to sue and what remedy to seek. As a general rule the defendant cannot dictate to the plaintiff who else should be made a co-defendant to the plaintiff's action. This general rule appears to be based on the following grounds:

(1) If the plaintiff alleges that the defendant is liable, it is trite that he who alleges must prove his claim failing which the action will be dismissed. There is no requirement for the defendant to allege and prove that he is not liable but someone else is. However if the defendant is of the view that a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant then the rules provide for instituting third party proceedings. Thus, the defendant is not totally without a remedy. He does not suffer any injustice. It also allows the court to consider all matters in dispute to be effectively and completely determined and adjudicated upon between all those directly concerned in the outcome. The plaintiff is in no way prejudiced by third party proceedings because the third party proceeding is between the defendant and the third party even though it is determined in the same action. The outcome does not in any way affect the plaintiff.

(2) If the court were to allow a co-defendant to be added on the application of the defendant, there is no provision the author knows of in the rules for the court to direct the plaintiff to amend his statement of claim and allege liability against the co-defendant, against the wishes of the plaintiff. It is an agreed fact that such an order if made will be directly in conflict with established principles. Further, once a co-defendant is added and the plaintiff does not amend his statement of claim the co-defendant can still make an application to court under Order 18 rule 19(1)(a) for the action against the co-defendant by the plaintiff to be dismissed on the grounds that the statement of claim does not show any cause of faction by the plaintiff against the co-defendant.

(3) Even though Order 15 rule 2(b) and the Subordinate Courts Rules 1980 Order 8 rule 6(2)(b) gives a discretion to the court to add or remove a party upon its own motion or application, it is submitted that the court will not exercise its discretion upon the application of the defendant if the whole exercise will be futile for the reasons stated in paragraph (1) and (2)

above (The rule in the case of Hee Awa must truly be a rare exception rather than a general rule).

[11] One can say that the aforesaid general principle is subject to O 15 r 6(2) of the Rules of Court 2012 which gives the court a discretion to add a co-defendant despite any objection by a plaintiff which in this case is PKNS.

[12] Premised on that, learned counsel for the respondent submits that the inclusion of the appellant as a co-defendant is to ensure that 'all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon'. Reliance is made on the cases of *Alcim Sdn bhd v Torlf Mueller & Ors* [2013] 1 LNS 469, *Tajjul Ariffin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143; [1993] 3 CLJ 117, *Kerajaan Negeri Kelantan v Kerajaan Malaysia* [2011] 6 CLJ 638 and *Abidin bin Umar v Doraisamy & Anor* [1994] 1 MLJ 617.

[13] In the context of this case, learned counsel also submits that if the appellant is not made a co-defendant, the trial court would not be in a position to apportion liability if the appellant is found to be 'solely or partly to blame' for the collapse of a section of a cloverleaf interchange. It is also submitted that the respondent would be prejudiced as it had prepared its defence on the ground that the appellant is liable for the aforesaid collapse for reasons as set out in para 4.16 of submission of the learned counsel.

[14] We have examined the cases cited by learned counsel for the respondent and what we have found is that there is a glaring distinguishing factor in our case which is not present in the cases cited and that is, PKNS being the plaintiff in this case had withdrawn its claim against the appellant with no order as to costs and no liberty to file afresh premised on a settlement reached among themselves. What that meant is that whatever pleadings made in the struck-out statement of claim had vanished from the pages of the statement of claim so to speak and hence cannot be part of any pleadings. And to require PKNS in such circumstances to maintain its claim against the appellant would also be against the very terms of the striking out order made by the court of PKNS's claims. Hence, we find merits in the contention by the learned counsel for the appellant that as between the appellant and PKNS, any action by PKNS against the appellant would be barred by the concept of res judicata.

[15] Further we see no prejudice to the respondent if a third party notice is taken out, a course of action which the appellant had not objected to in the High Court and likewise here before us during submissions. The guidelines set out in the Supreme Court decision in the case of *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* are instructive and they are these:

In his analysis of Chan Yee's case, KC Vohrah J pointed out — and we agree — that:

> there is nothing in the judgment to suggest that the plaintiff was required to amend his pleadings to take into account the added defendant nor is there anything therein to suggest that in opposing the application to add the co-defendant the plaintiff raised the issue that he would not be able to amend his statement of claim to take into account the addition of another person as a co-defendant.

And, next, dealing generally with both Hee Awa and Chan Yee's, he pointed out — and again we agree — that neither Hee Awa nor Chan Yee had whittled down the discretion of the court of first instance in considering applications for joinder of defendants in running down cases of the sort before him and that the decisions therein were made on their own merits having regard to the particular facts.

And then, turning to the merits of the case before him, the learned appellate judge said this:

> The plaintiff had no objections to all the prayers except for prayer 3 that is, the prayer that the plaintiff do make the necessary amendments to the statement of claim against the rider of the motor cycle on which the plaintiff was pillion rider and against the master or principal of the rider. The plaintiff objected to the prayer on the ground that there is no substantive law to compel the plaintiff to sue another party and he raised the issue as to what particulars the court would have to order the plaintiff to plead if the application for the prayer was allowed.

The learned judge of the sessions court allowed prayers to 1–6 except for prayer 3 and she held the view that she could not compel the plaintiff to plead negligence against the intended co-defendant. This is what she said:

It is indisputable that adding the co-defendants would ensure that all matters in dispute (would) be effectually and completely determined. However, to compel the plaintiff to make the amendments sought involves substantive rather than procedural law. Can the defendant then also specify the particulars of negligence to be pleaded or compel him to amend his pleadings yet again if the particulars of negligence pleaded are not satisfactory?

The learned appellate judge went on to remind himself of the well known proposition that in an action in tort the plaintiff has a free hand as to who to sue. The plaintiff is not now, and never was, obliged to join as a defendant every person who was liable to him for that tort. He may, if he prefers, sue one or two; and the liability of the others will be no defence to those sued, and will not mitigate the damage recoverable, for all persons concerned in a common wrongful act are jointly and severally liable for all damage caused by it. (See Odgers, on *Pleading and Practice* (20th Ed) p 20).

He then expressed his concurrence with the view of the learned judge of the sessions court that to have granted prayer 3 of the defendant's application would have meant compelling the plaintiff to plead particulars of negligence against the intended codefendant when there was nothing on record to show that the intended co-defendant was negligent.

And, towards the end of his judgment, he said this at p 37 para E line 3 to p 38 A line 4:

> Although the plaintiff had consented to the other prayers (and her counsel said

A he did so to save time as his objections in previous cases had been rejected) he objected to prayer 3 and he asked 'If court allows application, what particulars will the court order the plaintiff to plead? Do we plead particulars relevant to this case or not?' These are pertinent questions.

B He then concluded his judgment at p 38 A lines 4 et seq as follows:

> Bearing in mind the case of Norbury Natzio another pertinent question which has to be asked earlier is — is there anything on record to show, on a reasonable and probable basis, that the proposed co-defendant was wholly or partly responsible for the accident? There is none. And to order the plaintiff to amend her statement of claim would be in effect to compel the plaintiff to sue a proposed co-defendant who for all one knows was not responsible at all for the accident and therefore not tortiously liable, and, more importantly, to compel the plaintiff to plead particulars of negligence against the proposed co-defendant which may well be non-existent.

D In my view, the learned judge of the sessions court exercised her discretion correctly under O 8 r 6(2)(b) on the material available before her in the case and I accordingly dismiss the appeal.

To revert to the question of law posed at the outset, we consider that the following general principles as to parties may be distilled from the Rules of Court and the E authorities thereon.

(1) The principle of overriding importance is that all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and complete determination and adjudication to be made by the court of all questions and issues between the parties which F arise for decision. (See RHC O 15 rr 4 and 6.)

(2) To this end, no action will be defeated by reason of mere mis-joinder or and non-joinder of any party which is capable of being remedied and is no defence. (See *Abonloff v Oppenheimer* [1882] 30 WR 430.)
The joinder of parties is permitted as of right in a wide area of circumstances G or otherwise with the leave of the court. (See RHC O 15, r 4.)

(3) Additionally, the court has extensive discretionary powers — to add, substitute or strike out parties who are not proper or necessary, and for these purposes the court may even act of its own motion. (See RSC O 15 r 6.)

H (4) Generally, in Common Law and Chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue. (See Per Wynn-Perry J in *Dollfus Mieg et Compagnie SA v Bank of England* I [1951] Ch 33.)

(5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the Court of its own motion. (See *Supreme Court Practice, 1991*, Vol 1 p 193, para 15/6/7.)

(6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wish of the latter. (See *Hood-Bars v Frampton & Co* [1924] WN 287.) A third party notice is in such a case usually the proper procedure to adopt though such a defendant can be added in a proper case. (See *Dollfus Mieg et Compagnie SA v Bank of England*.)

[16] Applying the above guidelines to the case at hand, we have no hesitation, with respect, to disagree with the stand taken by the learned judge.

CONCLUSION

[17] For reasons stated above, we allow the appeal with costs in the sum of RM5,000 subject to payment of allocator fees. We also set aside the orders of the High Court and we further order that the deposit to be refunded.

[18] As a consequential order, we direct that the respondent file a third party notice against the appellant to which no objection can be raised by the appellant.

Appeal allowed, High Court set aside the order and directed the respondent to file a third party notice against the appellant.

Reported by Ashok Kumar